

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

INNOVATION VENTURES, LLC
d/b/a LIVING ESSENTIALS.,
a Michigan corporation,

Plaintiff,

v.

Case No. 03-71666
Hon. John Corbett O'Meara

NATURES ONLY, INC.
a California corporation,
CPB INTERNATIONAL, INC.
a Pennsylvania corporation
PHARMED MEDICARE,
a New York corporation,

Defendants.

BUTZEL LONG

By: J. Michael Huget (P39150)
Laurie J. Michelson (P47214)
Michael Turco (P48705)

150 W. Jefferson, Suite 900
Detroit, MI 48226
(313) 225-7000
Attorneys for Plaintiff

GIFFORD, KRASS, GROH, SPRINKLE,
ANDERSON & CITKOWSKI, P.C.

By: Douglas W. Sprinkle (P25326)
280 N. Old Woodward, Suite 400
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(248) 647-6000
Attorneys for Defendants

ORIGINAL

PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE

8

Plaintiff Innovation Ventures, LLC, d/b/a Living Essentials ("Living Essentials"), by its counsel, hereby responds to the Court's September 11, 2003 Order to Show Cause why this case should not be dismissed for Failure to Prosecute as follows:

1. Plaintiff filed its Complaint alleging trade dress infringement and related claims on April 29, 2003.

2. Very shortly after the filing, counsel for the parties began settlement discussions. Some of the correspondence pertaining to those discussions is attached at Exhibit A. Counsel for Defendants indicated initially that his clients had changed the packaging in a way that they believed might resolve the case at the outset. After reviewing the so-called revised packaging, counsel for Plaintiff indicated that the minor changes were in no way adequate to eliminate the likelihood of consumer confusion being caused by the similar packages.

3. Thereafter, counsel for the parties continued to try to settle the case, but were unable to do so. Accordingly, on September 10, 2003, counsel for Plaintiff asked the Defendants to file an answer by September 19, 2003. (Exhibit B). Prior to receiving the Court's Show Cause Order, counsel for Defendants indicated that he would be filing an Answer by Tuesday, September 23, 2003.

4. Plaintiff was receptive and willing to try to settle the case without the need for further litigation. As that has not yet proven to be possible, Plaintiff intends to fully prosecute this case once Defendants file their Answer.

5. While the parties were pursuing settlement, counsel for Plaintiff gave counsel for Defendants repeated extensions of time to answer the Complaint.

6. Plaintiff would be happy to provide additional information pertaining to the substance of the parties' conversations if the Court feels it is necessary. Because the parties were

actively seeking to settle the case, Plaintiff respectfully requests that the case not be dismissed for failure to prosecute.

Respectfully submitted,

BUTZEL LONG

By: 

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Attorneys for Plaintiff

Dated: September 26, 2003

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June 17, 2003

Our File: NOA-10070/04

Mr. J. Michael Huget
Butzel Long
150 W. Jefferson, Suite 900
Detroit, MI 48226-4450

Re: **Innovation Ventures, LLC v. Natures Only, Inc. et al.**
Case No. 03-71666

Dear Mr. Huget:

Enclosed herewith please find a copy of the new packaging of the Natures Only "Cheers" product. As you can see, the colors of the packaging as well as the trademark used in connection with the product are completely different from your client's product.

Indeed, the only similarity at all between the packaging used by your client and mine is in the size and the shape of the packaging. However, I am advised that this sort of packaging is a conventional sample package used in the medical industry for many years and by many different manufacturers.

Please give me a call after you have had a chance to review the packaging and discuss it with your client.

Very truly yours,


Douglas W. Sprinkle

DWS/gs
Enclosure

RECEIVED

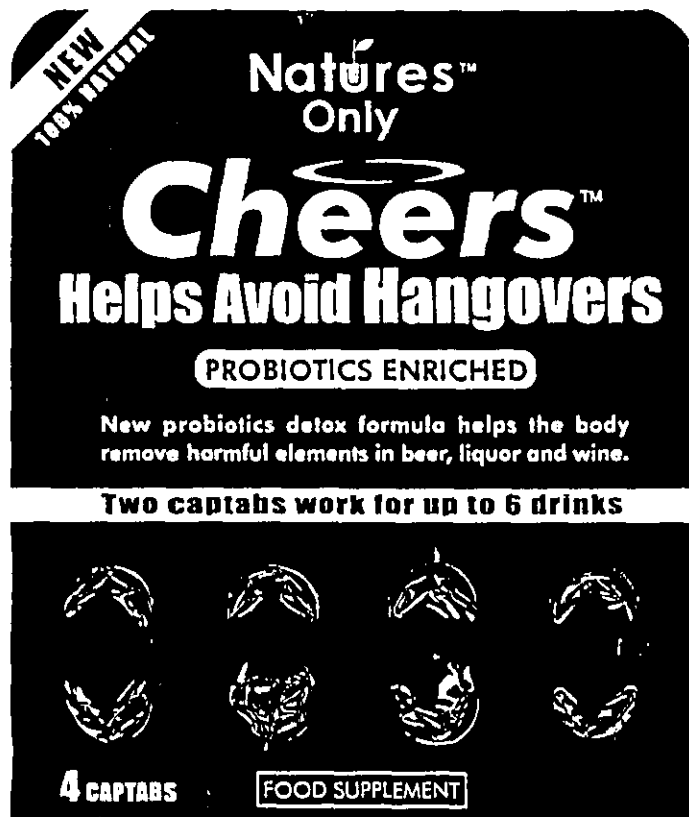
JUN 20 2003

J. MICHAEL HUGET

RECEIVED

JUN 19 2003

J. MICHAEL HUGET



PATENT
PENDING

STORE IN A
COOL DRY PLACE

Directions (per drinking session)

- Two captabs with your first drink
- For best results, take two more captabs every two hours or after five drinks
- To avoid dehydration from alcohol, drink plenty of water

Warning

- Please drink responsibly
- Not for use by minors
- Cheers will not prevent intoxication
- Never drink and drive
- Do not drink if you are pregnant or nursing
- Cheers does not treat or prevent consequences of excess alcohol consumption

Caution

Do not use more than 8 captabs in 24 hours period, for more than one week except under the supervision of your health physician

No statements presented here have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

Supplement Facts	
Serving Size 2 Captabs	
Amount Per Serving	% Daily Value
Activated calcium carbonate	600 mg *
Vegetable carbon	350 mg *
Lactobacillus Sporogenes 10(X) million units *	
* Not established	
Other Ingredients: Sucrose, Cellulose, Croscarmellose sodium, Stearic acid, Acacia, Vegetable magnesium stearate, Natural colour, Glazing agents	
FILL FROM PLAST. WHEAT CORN, SUT. LACTOSE, GLUTEN, ARTIFICIAL COLOURING, ARTIFICIAL FLAVOURS OR PRESERVATIVES	
SUITABLE FOR VEGANS AND VEGETARIANS	

**NaturesTM
Only**

Natures Only, Inc.
8560, Vineyard Avenue
Suite 410
Rancho Cucamonga
CA 91730, USA
email: info@2cheers.com
www.2cheers.com

Lot 301
Best Before APR. 2006



0 504480 700513

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July 7, 2003

VIA U.S. MAIL

Douglas W. Sprinkle
Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski, P.C.
280 N. Old Woodward Avenue
Suite 400
Birmingham, MI 48009-5394

Re: Innovation Ventures, LLC v. Natures Only, Inc., et al.
Case No. 03-71666

Dear Mr. Sprinkle:

I am in receipt of your June 17, 2003 letter enclosing a copy of the alleged "new" product packaging for the Nature's Only "Cheers" product and disagree with your conclusion that the package is "completely different" from our client's product.

In fact, we are surprised by the seemingly minimal effort undertaken by your clients to alleviate the concerns raised in our Complaint. The only changes that appear to have been to the Cheers packaging was the inclusion of some purple coloring and a few minor word tweaks. We doubt that it is coincidental that this purple coloring is the color used on our client's "Wine Chaser"[®] packaging. In other words, the Defendants' packaging was merely converted from a blatant copy of Living Essentials' "Chaser"[®] product packaging to a combination of its "Chaser"[®] and "Wine Chaser"[®] product packages.

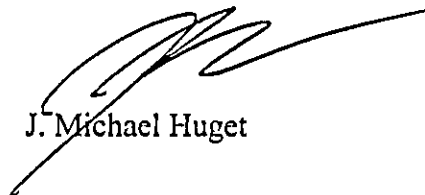
In addition to the remaining color and language similarities, the configurations of the packages remain identical. The "new" Cheers packaging still consists of the rounded, die-cut, fold-over card with a manually inserted blister that contains and exposes four caplets in see-through openings that was copied from the Chaser[®] packaging. Moreover, despite what you may have been told, we are not aware of any other similar products that use this specific type of packaging. If, however, you have examples that we are unaware of, please pass them along for our consideration.

We have little doubt that the proposed Cheers packaging is every bit as likely to cause consumer confusion in violation of the Lanham Act as the initial infringing packaging. Accordingly, we would request that the Defendants respond to the Complaint as it appears clear that the lawsuit will need to go forward.

July 7, 2003
Page 2

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

J. Michael Huget

JMH/ah

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July 15, 2003

Our File: NOA-10070/04

Mr. J. Michael Huget
Butzel Long
150 W. Jefferson, Suite 900
Detroit, MI 48226-4450

Via Facsimile

CONFIRMATION

Re: Innovation Ventures, LLC v. Natures Only, Inc. et al.
Case No. 03-71666

Dear Mike:

As per your request, I made an inquiry regarding similar packaging used by my client for other products. Accordingly, my client has provided me with pictures of no less than three separate products using virtually the identical packaging that is at issue in this lawsuit. I have been advised that my client has utilized this packaging since at least as early as 1999.

Apparently the major cost for such packaging resides in the tooling cost to produce the blister pack. Consequently, once my client has invested in that tooling, they tend to use the same blister pack for multiple products. That blister pack essentially dictates the overall shape and appearance of the packaging.

On a more urgent level, as I indicated to your assistant, I am leaving Wednesday, July 16 on vacation for ten days. I would like you to hold off on any action until we can talk after my return. However, if you insist upon proceeding forward and demand an immediate answer to the complaint, please contact my partner, Julie Greenberg, and she will take care of it. However, unless you contact Julie as noted above, I will assume that you will hold off until I return from vacation. Hopefully we will be able to work out an arrangement that is acceptable to all.

Very truly yours,

Douglas W. Sprinkle

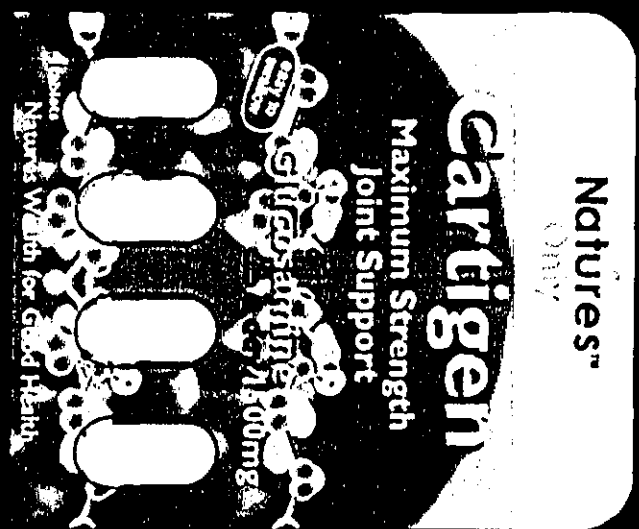
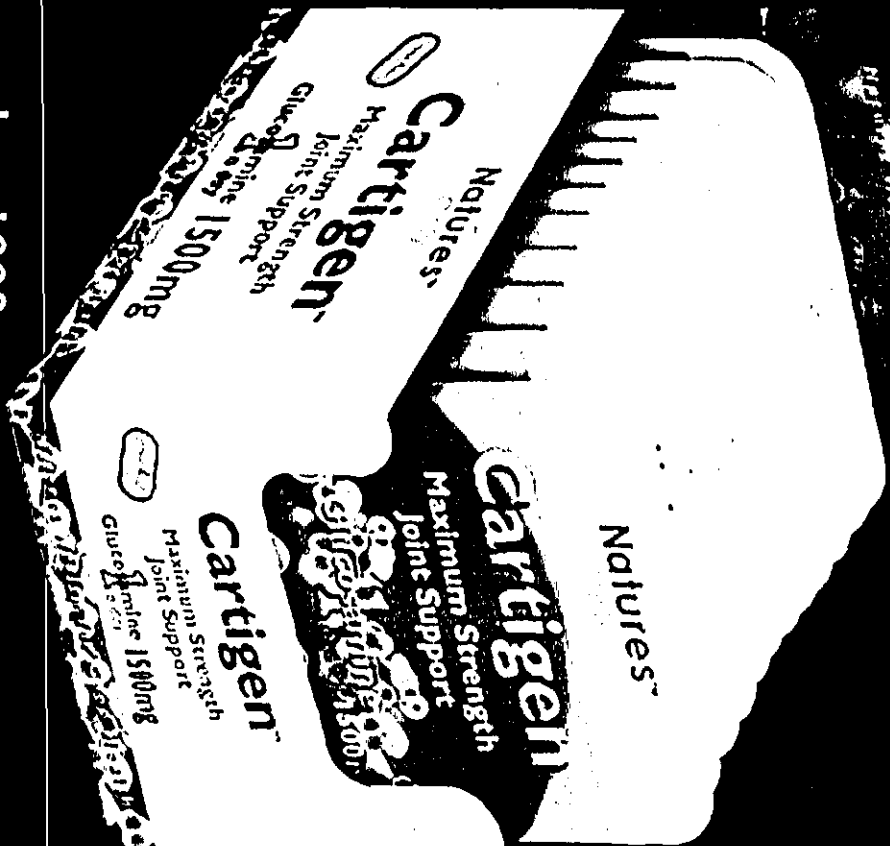
RECEIVED

JUL 17 2003

DWS/gs

J. MICHAEL HUGET

cc: Julie A. Greenberg



November 1999

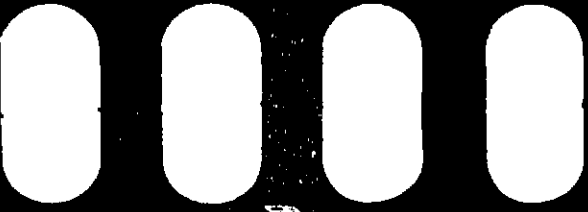


Supracal
1 x 4 Tablets

Supracal[®] Plus

Calcium Citrate, Magnesium, Zinc, Vitamin D₃
Plus Manganese, Silicon, Boron and Copper Tablets

**ULTIMATE BONE
BUILDER FORMULA**



TECHCON - PHARMED

Each film coated tablet contains:
 Calcium Citrate USP 1000 mg, Magnesium Hydroxide BP eq. to elemental Magnesium 100 mg,
 Zinc Sulphate Monohydrate USP eq. to elemental Zinc 4 mg, Vitamin D₃ 200 IU, Sodium Borate BP
 eq. to Boron 550 mcg, Manganese Sulphate BP eq. to Manganese 2 mg, Copper Sulphate BP
 eq. to Copper 1 mg, Colloidal Silicon Dioxide BP eq. to Silicon 2 mg
 Colour: Brilliant Blue FCF. Appropriate overages of vitamin D₃ are added. For Therapeutic Use
 Colour: Brilliant Blue FCF. Appropriate overages of vitamin D₃ are added. For Therapeutic Use
 Mfg. Lk. No. - K1K12R255-93
 Mfg. No.
 Mfg. Date
 Exp. Date
 Trade Mark

Manufactured by:
 Pharmmed Medicines Pvt. Ltd.,
 Pharmed Gardens, Whitefield Road,
 Bangalore - 560 048
 Under Technical Assistance of
 Techcon Corp., New York, USA.

TEENAGERS
 Calcium and Zinc promotes growth of healthy bones because teenage is a period of rapid growth when Calcium needs are particularly high.
SPORT / EXERCISE
 Calcium supplementation has been shown to enhance the positive effects of exercise on bone strength.
BREAST FEED BABIES
 Calcium, Zinc and Magnesium are required for the development and growth of the baby.
Menopause
 Continued to help replace the natural loss of Calcium during the period. Can be used in conjunction with HRT.
ADULTS (Men and Women)
 Bone mass is constantly changing and the age of 30 bone mass may start declining. Calcium and other bone building nutrients may help to maintain the balance between these processes.
SLIMMERS
 In addition to the replacement of Calcium and other bone building nutrients during dieting.
BREAST FEEDING MOTHERS
 Breast feeding infants require the same amount of Calcium and other bone building nutrients as a growing baby.
FOR THE ELDERLY
 Calcium and Zinc to the elderly to maintain bone mass and prevent osteoporosis.

There may be times when your body needs more calcium and bone fortifying nutrients than your diet provides

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July 18, 2003

VIA U.S. MAIL

Douglas W. Sprinkle
Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski, P.C.
280 N. Old Woodward Avenue
Suite 400
Birmingham, MI 48009-5394

Re: Innovation Ventures, LLC v. Natures Only, Inc., et al.
Case No. 03-71666

Dear Mr. Sprinkle:

This is in response to your letter of July 15, 2003.

Please provide me with documents or other information to substantiate your clients claim that he has used the packaging at issue since at least as early as 1999. Obviously, he should have records reflecting his investment in the tooling you mentioned in your letter as well as proposed mock-ups of the packaging.

I understand that you are on vacation at the moment. I would appreciate it if you would address this matter as soon as you can on your return. Please call me if there are any problems.

Very truly yours,

BUTZEL LONG


J. Michael Huget

JMH/ah

cc: Laurie Michelson
Thomas Morse

LAW OFFICES

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ANDERSON & CITKOWSKI, P.C.**

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July 28, 2003

Our File: NOA-10070/04

Mr. J. Michael Huget
Butzel Long
150 W. Jefferson, Suite 900
Detroit, MI 48226-4450

Via Facsimile
Confirmation by Mail

Re: Innovation Ventures, LLC v. Natures Only, Inc. et al.
Case No. 03-71666

CONFIRMATION

Dear Mr. Huget:

As I indicated to you on the telephone, my client has utilized substantially the identical packaging in issue in this lawsuit for other products at least as early as November 1999. Enclosed herewith are copies of some of those other products.

Since my client has utilized substantially the identical packaging for its products since 1999, it would seem that your client would be hard pressed to assert trade dress in the overall shape of the packaging itself. That would leave only the name of the product and possibly the colors of the packaging for your client to legitimately assert a Lanham Act claim. However, my client has always used the mark "Cures" which certainly is not confusingly similar to "Chaser" and my client has changed the color of its packaging from red to purple and thus is unlike your client's packaging.

After you have had a chance to consider this letter, please give me a call so that we can discuss it further.

Very truly yours,

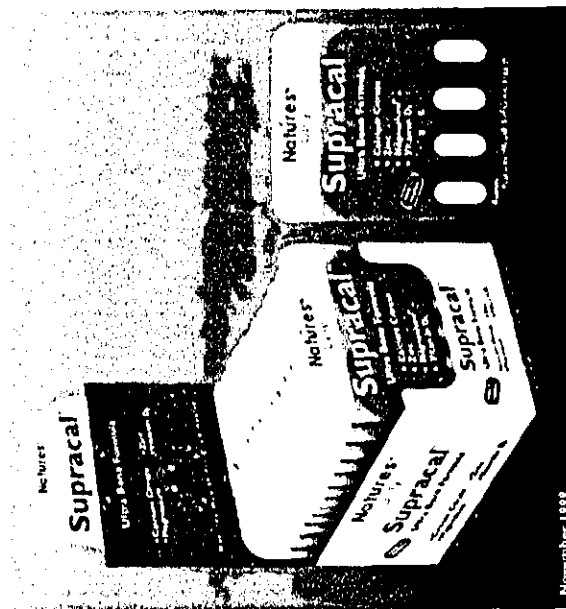
Douglas W. Sprinkle

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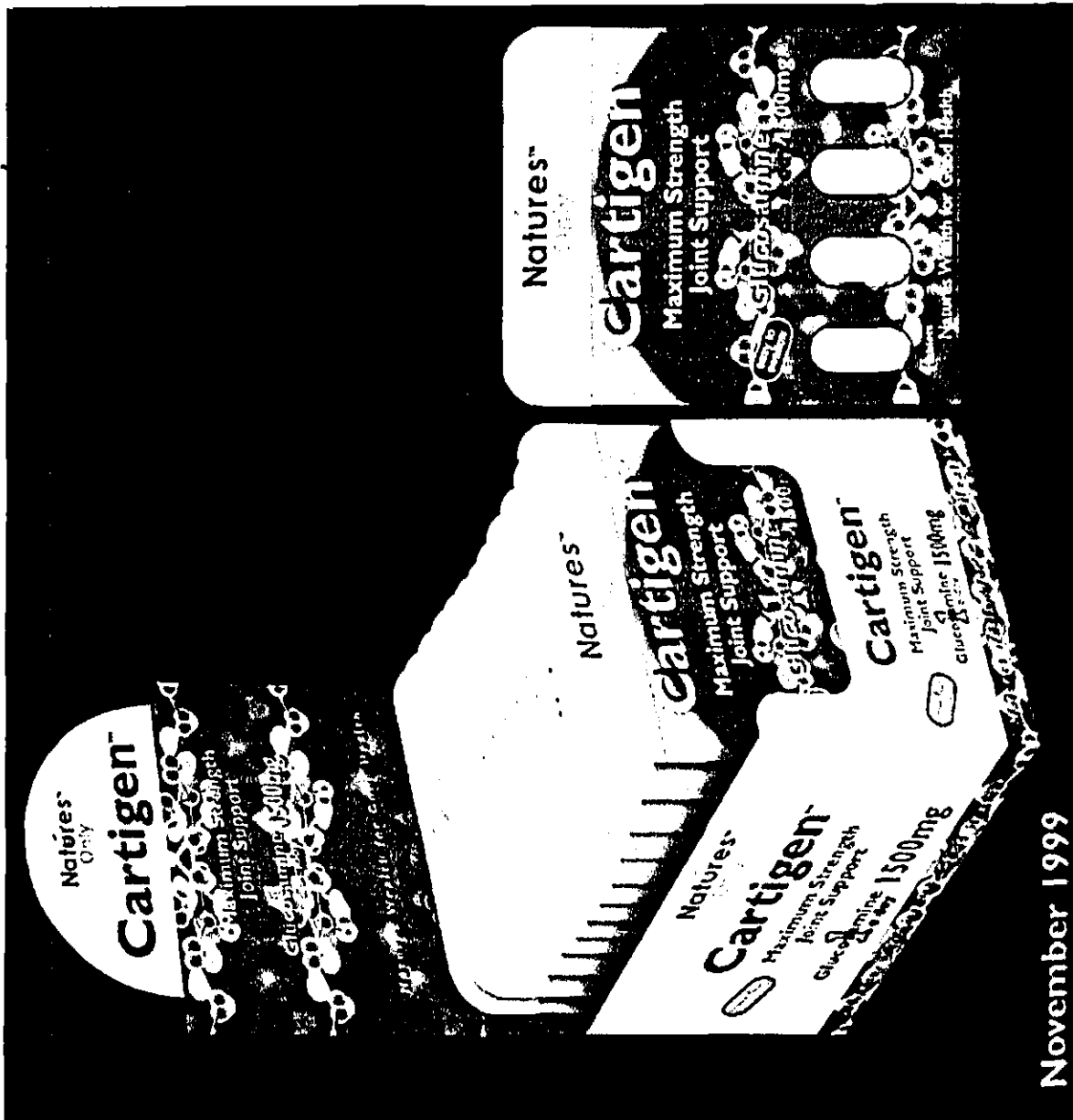
JUL 29 2003

DWS/gs
Enclosures

J. MICHAEL HUGET



November 1999



November 1999

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J. MICHAEL HUGET

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August 7, 2003

Douglas W. Sprinkle
Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski, P.C.
280 N. Old Woodward Avenue
Suite 400
Birmingham, MI 48009-5394

Re: Innovation Ventures, LLC v. Natures Only, Inc., et al.
Case No. 03-71666

Dear Mr. Sprinkle:

I am in receipt of your most recent letter regarding defendants' packaging. It does not appear as if we are making any progress towards settlement.

We have already indicated in a prior letter that we do not believe the minor changes in color made by the defendants alleviate the likelihood of confusion. To the contrary, the packages remain exceedingly similar and create a likelihood that consumers will believe the defendants' product is either affiliated with or sponsored by our client—especially since the only change made by the defendants was to substitute the colors from the Chaser package for the colors from the Wine Chaser package.

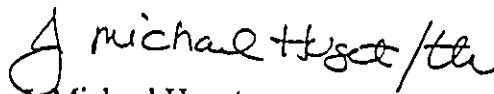
Additionally, the documentation attached to your letter is not sufficient to prove that your clients were the first to use the rounded, die-cut, fold-over card with a manually inserted blister that contains and exposes four caplets in see-through openings. Moreover, it appears clear that they were not using such packaging for a product that helps to alleviate hangovers prior to our client's use of this packaging.

Accordingly, since the defendants do not appear willing to substantially overhaul the design of the Cheers packaging, it does not appear as if we are going to be able to resolve the litigation. Therefore, we request that your clients answer the Complaint by August 22 so that the case can proceed accordingly. If you have a conflict with this date, please let me know as soon as possible.

Douglas W. Sprinkle
August 7, 2003
Page 2

If you have any questions, please do not hesitate to contact me.

Very truly yours,


J. Michael Huget

JMH:tln

cc: Tom Morse

91330v2

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June 12, 2003

Our File: NOA-10070/04

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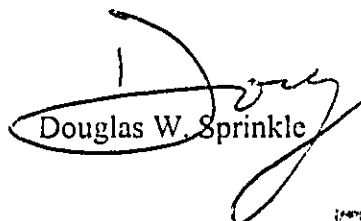
Re: Innovation Ventures, LLC v. Natures Only, Inc. et al.
Case No. 03-71666

Dear Mike:

This letter confirms our oral agreement earlier this week that, since we are in the midst of settlement discussions and willing to change the package in issue, you will not default the defendants in this case. In the unlikely event that the settlement discussions fall apart, I will need a week's notice to prepare and file the appropriate response to the complaint.

On a more important note, samples of the new packaging have been sent to me by DHL and I should receive them either tomorrow or next Monday. As soon as I receive them, I will have a sample delivered to your office.

Very truly yours,


Douglas W. Sprinkle

DWS/gs

RECEIVED

JUN 16 2003

J. MICHAEL HUGET

BUTZEL LONG

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September 10, 2003

VIA FACSIMILE

Douglas W. Sprinkle
Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski, P.C.
280 N. Old Woodward Avenue
Suite 400
Birmingham, MI 48009-5394

Re: Innovation Ventures, LLC v. Natures Only, Inc., et al.
Case No. 03-71666

Dear Mr. Sprinkle:

Please let this confirm my voice mail yesterday, at which time I indicated that the settlement proposal you had previously offered was not acceptable. Therefore, we expect that Defendants will be filing an answer. Please let me know if you cannot have an answer filed by September 19, 2003.

Very truly yours,

BUTZEL LONG



J. Michael Huget

JMH/ah

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

INNOVATION VENTURES, LLC
d/b/a LIVING ESSENTIALS.,
a Michigan corporation,

Plaintiff,

v.

Case No. 03-71666
Hon. John Corbett O'Meara

NATURES ONLY, INC.
a California corporation,
CPB INTERNATIONAL, INC.
a Pennsylvania corporation
PHARMED MEDICARE,
a New York corporation,

Defendants.

BUTZEL LONG

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PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

FILED
700 SEP 26 AM 10:55
U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Terri L. Nelson, declares that on the 26th day of September, 2003, she served a copy of the *Plaintiff's Response to Order to Show Cause*, together with a ***Proof of Service*** via regular mail to: Douglas W. Sprinkle, 280 N. Old Woodward, Suite 400, Birmingham, MI 48009; by placing same in a sealed envelope and depositing same in the United States mail in Detroit, Michigan, with postage fully prepaid.

I declare that the foregoing is true and accurate to the best of my information, knowledge and belief.

A handwritten signature in cursive script, reading "Terri L. Nelson", written in black ink.

TERRI L. NELSON